

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission	:	
On Its Own Motion	:	
	:	ICC Docket No. 11-0710
In re Proposed Contracts Between	:	
Chicago Clean Energy, LLC and Ameren	:	
Illinois Company and Between Chicago	:	
Clean Energy, LLC and Northern Illinois	:	
Gas Company for the Purchase and Sale	:	
of Substitute Natural Gas Under the	:	
Provisions of Illinois Public Act 97-0096.	:	

**VERIFIED APPLICATION FOR REHEARING OF
THE ECONOMIC DEVELOPMENT INTERVENORS**

COMPRISED OF:

THE ILLINOIS AFL-CIO,
THE CHICAGO & COOK COUNTY BUILDING & CONSTRUCTION TRADES COUNCIL,
THE HISPANIC AMERICAN CONSTRUCTION INDUSTRY ASSOCIATION,
THE ILLINOIS COAL ASSOCIATION,
THE MECHANICAL CONTRACTORS ASSOCIATION,
THE ILLINOIS FAITH BASED ASSOCIATION,
PASTORS UNITED FOR CHANGE,
THE CALUMET AREA INDUSTRIAL COMMISSION, and
THE SOUTH CHICAGO CHAMBER OF COMMERCE

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Dated: February 9, 2012

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The Illinois American Federation of Labor-Congress of International Organizers (the “Illinois AFL-CIO”), the Chicago & Cook County Building & Construction Trades Council (the “Trades Council”), the Hispanic American Construction Industry Association (“HACIA”), the Illinois Coal Association, the Mechanical Contractors Association, the Illinois Faith Based Association, Pastors United for Change, the Calumet Area Industrial Commission, and the South Chicago Chamber of Commerce (collectively, the “Economic Development Intervenors” or “EDI”), by and through their attorneys, the Law Office of Michael A. Munson, pursuant to Sections 9-220(h-4) and 10-113 of the Public Utilities Act, 220 ILCS 5/9-220(h-4), 220 ILCS 5/10-113, and Section 200.880 of the Rules of Practice of the Illinois Commerce Commission (the “Commission”), 83 Ill. Admin. Code § 200.880, respectfully submit this Verified Application for Rehearing of the Final Order entered by the Commission on January 10, 2012, and served upon the parties the same day.

I. INTRODUCTION

Repeatedly, the General Assembly has provided clear guidance regarding both its strong support for the clean coal SNG brownfield facility being developed on the South Side of Chicago (the “Facility”) and the framework for regulatory review of that Facility. Within this framework, the Commission is intended to play an important but specifically limited role with respect to the development of the Sourcing Agreement between the Facility developer, Chicago Clean Energy, LLC (“CCE”), and the purchasing utilities. Since 2009, the General Assembly, with super-majorities, has passed five separate pieces of legislation communicating the unambiguous desire for construction of the Facility. The governor signed into law all but one of these bills.

The last two pieces of enacted legislation specified that the Commission’s role in developing the Sourcing Agreement was to be limited. *See* P.A. 97-0630, at § 9-220(h-4); P.A. 97-0096, at § 9-220(h-4). The limited role is clear from the format of Public Act 97-0630, which shows subsection 9-220(h-4) as created by Public Act 97-0096, and then as amended by Public Act 97-0630 through the addition of the underlined text:

(h-4) No later than 90 days after the Illinois Power Agency submits the final draft sourcing agreement pursuant to subsection (h-1), the Commission shall approve a sourcing agreement containing (i) the capital costs, rate of return, and operations and maintenance costs established pursuant to subsection (h-3) and (ii) all other terms and conditions, rights, provisions, exceptions, and limitations contained in the final draft sourcing agreement; provided, however, the Commission shall correct typographical and scrivener's errors and modify the contract only as necessary to provide that the gas utility does not have the right to terminate the sourcing agreement due to any future events that may occur other than the clean coal SNG brownfield facility's failure to timely meet milestones, uncured default, extended force majeure, or abandonment. Once the sourcing agreement is approved, then the gas utility subject to that sourcing agreement shall have 45 days after the date of the Commission's approval to enter into the sourcing agreement.

P.A. 97-0630, at § 9-220(h-4).

Even to the extent that the General Assembly's intent was not clear from the straightforward plain language of Public Act 97-0630, the General Assembly has provided additional guidance to the Commission. First, the bill sponsors have provided both written comments (the "Sponsor Letter"), (*see* EDI's Brief on Exhibits, Ex. A), as well as oral comments at the Commission's January 10, 2012 Bench Session. Most recently, the Illinois House has adopted a Resolution reiterating the Commission's limited role in the regulatory framework and strongly supporting rehearing of the Commission's January 10, 2012 Order. *See* H.R. Res. 755, 97th Gen. Assemb., Reg. Sess. (Ill. 2012) (attached hereto as Exhibit A). The floor debate for House Resolution 755 makes abundantly clear the entire House's plain intent behind this section of the Act. *See* H. Debate, 97th Gen. Assemb., Reg. Sess. (Ill. Feb. 8, 2012), *available at* <http://youtu.be/qkRpehpL3KA>.

The Sponsor Letter, which was previously attached to the Economic Development Intervenors' Brief on Exhibits and is attached for convenience as Exhibit B hereto, could not have been clearer about the General Assembly's intent behind Public Act 97-0630. The Sponsor Letter established that:

- (1) the Commission was intentionally given a very limited role;
- (2) the General Assembly—itsself and, to a lesser extent, the Illinois Power Agency (the "IPA") in carrying out negotiations for the Final Draft Sourcing Agreement—already settled on appropriate contract terms, which were not to be revised by the Commission; and
- (3) the General Assembly clearly intends to see the Facility developed so Illinois and its citizens can reap the substantial benefits.

(See EDI's Brief on Exceptions, Ex. A at 2-4.) The Sponsor Letter provided substantial back-up for the conclusions, and included a request that the Commission adhere to the General Assembly's intent and avoid entering an Order that would "kill the Chicago Clean Energy project." (See *id.* at 4.)

Despite the guidance given in the Sponsor Letter, the Commission's January 10, 2012, Final Order almost entirely accepted the terms of the Proposed Order, thus putting the financing and development of the Facility in serious jeopardy. By this *carte blanche* acceptance of the proposed order, the Final Order:

- (1) improperly revised terms of the Sourcing Agreement relating to cost recovery and related issues, including billing determinants, annual output, and the monthly base overage amount;
- (2) improperly imposed additional obligations upon the Facility developer that are not supported by the Commission's statutory authority or the factual record before the Commission, including a third-party guarantee requirement, a capital structure reporting requirement, and a carbon sequestration plan requirement;
- (3) improperly declined to delete an early termination provision from the Sourcing Agreement, directly contrary to the direction of Public Act 97-0630; and
- (4) improperly declined to correct typographical and scrivener's errors.

Accordingly, the Economic Development Intervenors respectfully request that the Commission grant rehearing on each of these items. Without rehearing, the Facility and all of the economic

development benefits that it would provide to the surrounding community and the State of Illinois cannot come to fruition.

The Economic Development Intervenors appreciate that the constrained timeline in this proceeding is unusual and placed the Commission in an unusual position. Additionally, the Economic Development Intervenors appreciate the statements of the majority of the Commissioners at the January 10, 2012, Bench Session encouraging rehearing of the Final Order. Those statements were correct—rehearing is the proper next step under the circumstances in this proceeding.

II. THE COMMISSION SHOULD GRANT REHEARING TO REVISE ITS FINAL ORDER TO COMPORT WITH THE LIMITED AUTHORITY THAT THE GENERAL ASSEMBLY HAS GIVEN THE COMMISSION.

The Commission should rehear this matter because the Final Order fails to give effect to the intent behind the statutory directive that meant to enable development of the Facility on the South Side of Chicago.

The General Assembly has worked for years in developing the legislation that enables the construction of the Facility. Table 1 summarizes the General Assembly's thoughtful and thorough process.

Table 1: Summary of Legislative Action

Bill/Public Act	Substance	Vote and Sponsors
<p>S.B. 658 (incl. H.A. 3)</p> <p>96th Gen. Assemb.</p> <p>P.A. 096-0784</p> <p>Eff. Aug. 28, 2009</p>	<p>To enable a Facility Cost Report:</p> <ul style="list-style-type: none"> • State will reimburse the costs of a facility cost report, up to \$10 million, for SNG facility that gasifies Illinois basin coal or petcoke with carbon capture and sequestration. • The facility cost report is due on Apr. 30, 2010, and should provide information on the construction costs for the core plant, the balance of plant, the expected fuel cost, and the expected O&M cost. • The facility cost report will be reviewed by the Illinois Power Agency 	<p><u>House:</u> 118-0-0</p> <p><u>Senate:</u> 57-0-0</p> <p><u>Senate Sponsors:</u> Sens. Donne E. Trotter, Gary Forby, Mike Jacobs, James F. Clayborne, Jr., David Luechtefeld, Martin A. Sandoval, and Dan Rutherford</p> <p><u>House Sponsors:</u> Reps. Marlow H. Colvin, Kenneth Dunkin, Daniel V. Beiser, Al Riley, Deborah L. Graham, Dan Reitz, and Mike Bost</p>
<p>S.B. 52 (incl. H.A. 2 and 3)</p> <p>96th Gen. Assemb.</p> <p>P.A. 096-0781</p> <p>Eff. Aug. 28, 2009</p>	<p>Trailer Bill S.B. 658 to clarify funding source for the Facility Cost Report:</p> <ul style="list-style-type: none"> • The funding for the \$10 million is Coal Development Bonds • The funding flows through Illinois DCEO, Office of Coal Development • Only one brownfield project can qualify 	<p><u>House:</u> 118-0-0</p> <p><u>Senate:</u> 57-0-0</p> <p><u>Senate Sponsors:</u> Sens. Donne E. Trotter, John O. Jones, Mike Jacobs, James F. Clayborne, Jr., Dale E. Risinger, Deanna Demuzio, and Dan Rutherford</p> <p><u>House Sponsors:</u> Reps. Marlow H. Colvin, Mike Bost, Rich Brauer, Dan Reitz, Mark H. Beaubien, Jr., Raymond Poe, Jerry L. Mitchell, David R. Leitch, Deborah L. Graham, and Kenneth Dunkin</p>

Bill/Public Act	Substance	Vote and Sponsors
<p>S.B. 3388 (incl. H.A. 1, 2, and 3)</p> <p>96th Gen. Assemb.</p> <p>Vetoed March 14, 2011 (no procedural opportunity for override due to new G.A. in place)</p>	<p>To create the framework for sourcing agreements to enable the construction of a clean coal brownfield SNG facility in Illinois, creating thousands of jobs, advancing clean coal technology, creating an in-state supply of natural gas, and protecting consumers:</p> <ul style="list-style-type: none"> • CCE would sell 44 billion cubic feet of SNG per year to gas utilities and the IPA for 30 years, at a price set by formula, with consumer protection provided by a Consumer Protection Reserve Account (“CPRA”), IPA and Commission oversight, and a \$100 million guaranteed savings provision. • The SNG facility would be required to capture at least 85 percent of the CO₂ which would otherwise be emitted. 	<p><u>House:</u> 86-27-2</p> <p><u>Senate:</u> 36-13-4</p> <p><u>Senate Sponsors:</u> Sens. Donne E. Trotter, Dale E. Risinger, Edward D. Maloney, John J. Millner, and Gary Forby</p> <p><u>House Sponsors:</u> Reps. Marlow H. Colvin, Dan Reitz, Angelo Saviano, Joseph M. Lyons, Donald L. Moffitt, Michael K. Smith, Daniel J. Burke, Mark H. Beaubien, Jr., Bob Biggins, Raymond Poe, Rich Brauer, Dave Winters, Betsy Hannig, Jim Sacia, Sandra M. Pihos, Robert W. Pritchard, Daniel V. Beiser, Kevin A. McCarthy, Constance A. Howard, Michael J. Carberry, John M. O'Sullivan, Rita Mayfield, Anthony DeLuca, Robert Rita, Randy Ramey, Jr., John D'Amico, LaShawn K. Ford, Luis Arroyo, Maria Antonia Berrios, Edward J. Acevedo, Paul D. Froehlich, and Michael W. Tryon</p>

Bill/Public Act	Substance	Vote and Sponsors
<p>S.B. 1533 (incl. H.A. 1)</p> <p>97th Gen. Assemb.</p> <p>P.A. 97-096</p> <p>Eff. July 13, 2011</p>	<p>Improves upon initial legislation, S.B. 3388, to address the Governor's concerns:</p> <ul style="list-style-type: none"> • Proportionate allocation of the gas produced to participating utilities • Increase requirements to maintain CPRA at \$150 million, rather than \$100 million • All retail customers of a utility (i.e., residential, commercial and industrial) participate. All customers share in the benefit of the guaranteed \$100 million in savings. • 2 percent rate cap added to further protect consumers. • Specific targets for disadvantaged groups 	<p><u>House:</u> 75-38-1</p> <p><u>Senate:</u> 39-16-1</p> <p><u>Senate Sponsors:</u> Sens. Donne E. Trotter, Mike Jacobs, John J. Millner, and Michael Noland</p> <p><u>House Sponsors:</u> Reps. Marlow H. Colvin, Elaine Nekritz, John E. Bradley, Mike Bost, Dan Reitz, Ann Williams, Ed Sullivan, Jr., Angelo Saviano, Derrick Smith, Joseph M. Lyons, Jim Sacia, Esther Golar, and Charles E. Jefferson</p>
<p>H.B. 697 (incl. H.A. 1)</p> <p>97th Gen. Assemb.</p> <p>P.A. 97-630</p> <p>Eff. Dec. 8, 2011</p>	<p>Authorizes the Commission to correct <i>only</i> the following items within the final draft sourcing agreements:</p> <ul style="list-style-type: none"> • Input approved rates of return for construction and O&M costs. • Remove from the IPA base contract document the two early termination provisions that are unrelated to CCE non-performance. • Correct typographical and scrivener's errors. 	<p><u>House:</u> 73-39-2</p> <p><u>Senate:</u> 40-18-0</p> <p><u>House Sponsor:</u> Rep. Marlow Colvin</p> <p><u>Senate Sponsor:</u> Sen. Donne Trotter</p>

Bill/Public Act	Substance	Vote and Sponsors
H.R. 755 97th Gen. Assemb. Feb. 8, 2011	Expresses the concerns of the House of Representatives over the Commission's decision regarding the Chicago Clean Energy project, and requests that the Commission rehear the matter.	<u>Passed by Voice Vote Without Dissent</u> (any single member could have requested a roll-call vote) <u>House Sponsors:</u> Reps. Marlow H. Colvin, Michael J. Madigan, Esther Golar, Mike Bost, Timothy L. Schmitz, Frank J. Mautino, Derrick Smith, Lou Lang, Al Riley, Lisa M. Dugan, Kimberly du Buclet, Arthur Turner, Donald L. Moffitt, Brandon W. Phelps, Kenneth Dunkin, David Reis, Randy Ramey, Jr., Jim Sacia, Dwight Kay, Greg Harris, Robert W. Pritchard, JoAnn D. Osmond, Dave Winters, Roger L. Eddy, Sidney H. Mathias, Patrick J. Verschoore, Daniel V. Beiser, Rich Brauer, Elaine Nekritz, Robert Rita, Renée Kosel, Wayne Rosenthal, Michael P. McAuliffe, Mr. Charles W. Krezwick, John E. Bradley, Joseph M. Lyons, Linda Chapa LaVia, Daniel J. Burke, Jack McGuire, Jim Watson, and Ed Sullivan, Jr.
S.R. 585 97th Gen. Assemb. Hearing set for Feb. 23, 2012	Identical to H.R. 755.	<u>Senate Executive Committee</u> Hearing set when the Senate next reconvenes, with full Senate adoption anticipated that session week. <u>Senate Sponsors:</u> Sens. Donne E. Trotter, Pamela J. Althoff, David S. Leuchtefeld, Wm. Sam McCann, Iris Y. Martinez, Gary Forby, Ira I. Silverstein, James F. Clayborne Jr., Martin A. Sandoval, Antonio Munoz, Mike Jacobs, Linda Holmes, John G. Mulroe, Steven M. Landek, John M. Sullivan, Mattie Hunter, William Delgado and William E. Brady

The Commission's Final Order is governed by subsection 9-220(h-4) of the Act, which was amended by Public Act 97-0630 before the Commission issued its Final Order. *See* 220 ILCS 9-220(h-4), *amended by* P.A. 97-0630. As originally drafted, subsection (h-4) only

authorized the Commission to determine an appropriate return on equity and fill in the blanks with the capital and operations and maintenance costs approved by the Capital Development Board. *See* P.A. 97-0630. In Public Act 97-0630, the General Assembly:

- (1) provided an explicit reference to subsection (h-3) for how the Commission is to calculate the capital and operations and maintenance costs and the rate of return;
- (2) directed the Commission to correct typographical and scrivener's errors; and
- (3) directed the Commission to remove all provisions that would have the effect of allowing early termination for reasons other than those enumerated in subsection (h-4).

See id. With the language added in the trailer bill, the General Assembly communicated a clear intent that the Commission undertake only those discrete, limited tasks enumerated in the statute. Put another way, the trailer bill set forth the straightforward steps that the Commission was to undertake, as reflected in Table 2, which explains the actions directed by the General Assembly and the reflecting legislative language from subsection (h-4).

Table 2: Legislative Language Breakdown

Action Directed	Legislative Language (220 ILCS 5/9-220(h-4))
Fill in blanks for capital costs, operations and maintenances costs, and a return on equity	“[T]he Commission shall approve a sourcing agreement containing (i) the capital costs, rate of return, and operations and maintenance costs established pursuant to subsection (h-3)”
Approve all other terms in the Final Draft Sourcing Agreement with the two following exceptions:	“[T]he Commission shall approve a sourcing agreement containing . . . all other terms and conditions, rights, provisions, exceptions, and limitations contained in the final draft sourcing agreement; provided, however,”
Correct typographical and scrivener's errors	“the Commission shall correct typographical and scrivener's errors”
Remove non-compliant early termination provisions	“and [shall] modify the contract only as necessary to provide that the gas utility does not have the right to terminate the sourcing agreement due to any future events that may occur other than the clean coal SNG brownfield facility's failure to timely meet milestones, uncured default, extended force majeure, or abandonment.”

These limitations were reiterated on February 8, 2012, when the House adopted a resolution (“Resolution”) reiterating the contents of the Sponsor Letter, which should further be used to understand the General Assembly’s legislative intent. (*See* Ex. A.) “Legislative resolutions are entitled to respectful consideration by the courts.” 1A Sutherland Statutory Construction § 29:8 (7th ed. 2009). The Resolution specifically expresses serious concerns with the Commission’s disregard for the plain language of subsection (h-4), and urges rehearing to correct the deficiencies in the Commission’s Final Order where the Commission acted contrary to subsection (h-4). (*See* Ex. A.) The Resolution explicitly lists the deficiencies that the General Assembly expects the Commission to resolve on rehearing. (*See id.*)

Although the statutory direction that the Commission’s role was to be limited appears to have been clear from the outset, to the extent that the Commission believes there was some lack of clarity, the “trailer bill” and the Resolution’s reiteration of the Commission’s limited role in

the regulatory framework is further evidence that the Commission's Final Order overstepped the Commission's statutory authority. *See, e.g., Miller v. LaSalle Bank N.A.*, 595 F.3d 782, 790 (7th Cir. 2010) (noting that subsequent legislative pronouncements on an "unclear statute" are entitled to be "respectfully considered.").

House Resolution 755 is of particular significance for several reasons. First, it comes from the same General Assembly (i.e., the 97th) that passed both Public Acts 97-0096 and 97-0630. Second, while it reiterates many of the points in the Sponsor Letter, the Resolution is a collective statement from the entire House, not just the bill sponsors. Third, it is not routine for the General Assembly to be sufficiently concerned with interpretation of its own laws that the General Assembly adopts a Resolution, especially a resolution as direct and strongly-worded. Fourth, much the way the Joint Committee on Administrative Rules provides guidance to the Commission, it is appropriate for the Commission to give weight to the Resolution.

The Commission is an agency, and it only has the power given to it by statute. *See Bus & Prof. People v. Ill. Commerce Comm'n ("BPI I")*, 136 Ill. 2d 192, 201 (1989). With this in mind, the Commission should, on rehearing, reconsider the substantial limitations imposed on the Commission by Section 9-220(h-4). Additionally, the Commission should be sure to do justice by giving weight and consideration to the plain intent behind the legislation that enabled development of the Facility. The General Assembly clearly intended the project to be completed. (*See* EDI's Brief on Exceptions, Ex. A.) Accordingly, the Commission should accept this matter for rehearing to ensure that the Facility is, in fact, completed, subject to reasonable regulatory oversight.

To be clear, the Final Order would render construction of the Facility unfinanceable, and would effectively kill the project. That result is plainly contrary to the applicable legislation,

which endorses the development of the Facility. There is no indication that the Commission's approval of the sourcing agreement was intended to be a mechanism to stop the Facility's development. On the contrary, it is plainly intended to establish a regulatory framework that results in reasonable oversight of a project that, in the eye of the General Assembly, offers enormous benefits to the City of Chicago, the surrounding region, and the entire State of Illinois. Those benefits were enumerated in the Briefs on Exceptions and Reply Briefs on Exceptions of the Economic Development Intervenors and CCE. They were further enumerated by the comments of the sponsoring legislators who spoke during the public comment period at the Commission's January 10, 2012, Bench Session, as well as the representatives of the Economic Development Intervenors who also spoke at that meeting. The General Assembly, as evidenced by the letter submitted by chief sponsors Sen. Trotter and Rep. Colvin, (*see* EDI's Brief on Exceptions, Ex. A), determined that the clean coal SNG brownfield facility should be built after gaining appropriate agency approvals.


III. CONCLUSION

While this proceeding at the Commission is surely novel, the Public Acts that enabled the clean coal SNG brownfield facility are clear. Respectfully, the Commission's Final Order failed to comport with the limitations placed upon the Commission by that legislation, resulting in a situation that is plainly contrary to the legislative intent favoring the development of the Facility, with appropriate oversight. To remedy this result, the Economic Development Intervenors respectfully request that the Commission grant rehearing to ensure that the General Assembly's intent is honored and that the Commission comply with its legislatively-mandated administrative directive.

WHEREFORE, the Economic Development Intervenors respectfully request that the Commission accept this matter for rehearing, grant the relief sought in CCE's Application for Rehearing, and grant any further relief that the Commission deems just and appropriate.

Respectfully submitted,

THE ECONOMIC DEVELOPMENT INTERVENORS,
comprised of
THE ILLINOIS AFL-CIO,
THE TRADES COUNCIL,
HACIA,
THE ILLINOIS COAL ASSOCIATION,
THE MECHANICAL CONTRACTORS ASSOCIATION,
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Dated: February 9, 2012